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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT ANTHONY CICCONE,

Defendant and Appellant.

A126350

**(Contra Costa County
Super. Ct. No. 050901488)**

Vincent Anthony Ciccone appeals from a judgment placing him on felony probation after a jury convicted him of receiving a stolen motor vehicle and evading an officer. He argues that the judgment must be reversed because some jurors saw him transported to the courtroom while in custody and the court declined to issue an order forbidding the Sheriff's Department from continuing this practice. He also contends his conviction for receiving stolen property must be reversed because it is inconsistent with a verdict of acquittal on a charge of taking or driving a vehicle which arose from the same incident. We affirm.

I. FACTS AND PROCEDURAL HISTORY

At about 10:00 p.m. on December 28, 2008, Contra Costa County Sheriff's Deputy Gackowski saw appellant driving an off-road motorcycle on a surface street and without a helmet. The deputy activated the overhead light bar and siren of his patrol car and began following the motorcycle, but appellant did not yield. The motorcycle hit the bumper of a parked car and tipped over, and appellant got up and ran away until he was stopped by the deputy at gunpoint. After he was advised of his rights under *Miranda v.*

Arizona (1966) 384 U.S. 436, appellant told the deputy that he knew the motorcycle had been stolen from a house in the city of Concord and that a friend had given it to him shortly before he was stopped. He also admitted that he had noticed when the deputy activated the lights and siren of the patrol car.

The motorcycle was registered to Steve Weyrauch and was being stored at the home of his friend, Blaise Haro. After receiving a call from Weyrauch's wife telling him that someone had been arrested with the motorcycle, Haro checked his garage and discovered that several items, including the motorcycle, were missing.

The district attorney filed an information charging appellant with several offenses and the case proceeded to trial on charges of unlawfully taking or driving a vehicle under Vehicle Code section 10851, subdivision (a), receiving a stolen motor vehicle under Penal Code section 496d, evading an officer under Vehicle Code section 2800.1, and unlawfully taking or driving a Ford Mustang during an unrelated incident.

Appellant testified at trial and claimed that a man sold him the motorcycle in front of a liquor store on the night he was arrested. He received a receipt that he thought "was fake at first but everybody tells me I guess you can do a written bill of sale." Appellant denied telling the deputy that he knew the motorcycle was stolen. Appellant's friend Angela Brooks testified that she and appellant and another friend were approached by a man with the motorcycle in front of the liquor store, that appellant stopped to speak to the man and returned to her house with the motorcycle, and that appellant drove away from her house on the motorcycle.

The jury convicted appellant of receiving a stolen motor vehicle and evading an officer, but acquitted him of the two counts of taking or driving a vehicle. The court found prior conviction and prior prison term allegations to be true during a bifurcated proceeding. (Pen. Code, §§ 666.5, 667.5, subd. (b).) After denying appellant's motion for a new trial, it imposed a prison sentence, suspended execution of that sentence, and placed appellant on felony probation subject to his completion of a one-year residential drug treatment program.

II. DISCUSSION

A. *Transportation of Appellant to Courtroom in Jurors' Presence*

Appellant was in custody during the trial. He contends the judgment must be reversed because the trial court refused to order the Sheriff's Department to refrain from transporting him to and from the courtroom while jurors were present in the adjacent hallway. We disagree.

Voir dire in this case was conducted on Wednesday, May 13, 2009, and testimony began on Thursday, May 14, 2009. On Thursday afternoon, defense counsel advised the court, "I understand that on three occasions, twice yesterday and once today, Mr. Ciccone has been transported across the hallway in custody in the presence of some jurors. And I'm troubled by that because obviously they're not to know that he's in custody. [¶] And I would ask the Court to ask the custodial staff to see to it that he's moved about the courthouse when the jurors are not there to see him. I understand there are some logistical difficulties with the side of the building that we're on but I don't think--"

The court denied the request but offered to admonish the jury that it could not consider defendant's custodial status for any purpose. It noted that the situation was unavoidable due to the design of the courthouse, but it did not believe it had the authority to order the Sheriff's Department to transport defendants at a particular time. Defense counsel declined the offer of a cautionary instruction. The record does not indicate whether appellant was transported to the courtroom in the presence of jurors on the next court date, Monday, May 18, 2009, when the case was submitted to the jury.

Appellant argues that the court violated his right to a fair trial when it declined to issue an order preventing his transportation to the courtroom when jurors were present. He claims the practice of bringing criminal defendants to court through the courthouse hallway impaired the presumption of innocence and was allowable only upon a showing of "manifest need"—a showing that could not be made given the available remedy of scheduling transportation at a time when no jurors from the case were present. Appellant relies primarily on the decision in *People v. Stevens* (2009) 47 Cal.4th 625, 629, which

examined the law concerning permissible courtroom security practices and concluded that the stationing of a courtroom deputy near a testifying defendant was not inherently prejudicial and did not require reversal absent an abuse of discretion by the court and a showing of actual prejudice.

Appellant's contention fails for several reasons. First, this is not a case involving physical restraints, as there is no indication in the record that appellant was shackled or even handcuffed as he was escorted to the courtroom. Thus, authorities treating shackling and similar measures as inherently prejudicial and permissible only upon a showing of manifest need are inapposite. (Contrast *Deck v. Missouri* (2005) 544 U.S. 622, 630 [visible restraints erode presumption of innocence by suggesting the defendant is a dangerous person who must be separated from the rest of the community]; *People v. Duran* (1976) 16 Cal.3d 282, 291-292.) And even if we assume that appellant may have been handcuffed, the brief observation of a defendant in physical restraints while being transported does not itself amount to prejudicial error. (*People v. Jacobs* (1989) 210 Cal.App.3d 1135, 1141; see also *Duran, supra*, at p. 289.)

Second, defense counsel did not request a mistrial when he raised the issue in the trial court. He sought prospective relief only, in the form of an order directing that in the future appellant be brought to court outside the presence of the jurors. Appellant cannot demonstrate prejudice from the denial of this request because the record does not establish that any juror actually saw appellant being transported after defense counsel brought the matter to the court's attention.

Third, the court offered to admonish the jury that it was to disregard appellant's custodial status. Such an admonition would have been sufficient to cure any prejudice. (*People v. Cecil* (1982) 127 Cal.App.3d 769, 778.)

Fourth, while case law has recognized that prejudice may occur from "the constant reminder of the accused's [custodial] condition" (*Estelle v. Williams* (1976) 425 U.S. 501, 504) the presumption of innocence is not impaired simply because some jurors might have realized that appellant was in custody during his trial (*Jacobs, supra*, 210 Cal.App.3d at p. 1141). There is no suggestion appellant was wearing jailhouse garb

when he was taken to the courtroom and defense counsel made no mention of any courtroom security measures that might have emphasized appellant's custodial status during the trial itself. Appellant's transportation through the hallway in civilian clothes while accompanied by a deputy simply does not create the potential for the impairment of the presumption of innocence that might arise if information about his status was repeatedly conveyed to the jury. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1336.)

Finally, appellant has not demonstrated prejudice under any standard. He notes that the jury asked a number of questions during deliberations and returned verdicts of acquittal on two of the counts. If anything, this tends to show the jurors considered the charges dispassionately and focused on the admissible evidence, rather than on appellant's custodial status. (See *People v. Smith* (2003) 30 Cal.4th 581, 617 [acquittal of one count suggested jury's deliberations were not affected by prosecutor's allegedly baseless questions about oral copulation]; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1310, 1312 [reversal not required in case where some jurors overheard comment about "repeated sexual abuse" during a bench conference, but defendant was acquitted of several counts: "[T]hat defendant was acquitted of *any* of the offenses suggests the lack of prejudice and the jury's clear ability to consider each count on the evidence presented and nothing else"].)

B. *Inconsistent Verdicts*

Appellant argues that his conviction of receiving a stolen motor vehicle must be reversed because it is inconsistent with his acquittal on a count of taking or driving that same vehicle. We are not persuaded.

Preliminarily, we disagree that the verdicts are inconsistent. Taking or driving a vehicle under Vehicle Code section 10851 requires the specific intent to permanently or temporarily deprive the owner of title or possession. (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574.) The crime of receiving a stolen motor vehicle requires knowledge that the vehicle received was stolen. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425.) While knowledge that a vehicle has been stolen may constitute evidence of the defendant's intent to deprive the owner of title and possession, the two

states of mind are not synonymous. (See *O'Dell* at p. 1574; *People v. Calpito* (1970) 9 Cal.App.3d 212, 219 [verdicts are not inconsistent when rendered on charges in which elements are not identical].)¹

Even if we deem the verdicts inconsistent as a factual matter, reversal is not required. Penal Code section 954 provides in part, “An acquittal of one or more counts shall not be deemed an acquittal of any other count.” A guilty verdict supported by substantial evidence is permissible even if it is inconsistent with an acquittal on another count. (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) “It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] [¶] . . . [¶] . . . An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict.” (*Ibid*; see also *United States v. Powell* (1984) 469 U.S. 57, 64-65.)

Substantial evidence supports appellant’s conviction of receiving a stolen motor vehicle: he was arrested while driving a stolen motorcycle and, according to the deputy who arrested him, admitted that he knew the motorcycle had been stolen from a house in Concord. Reversal of this count is not required simply because it may be factually inconsistent with appellant’s acquittal on a charge of taking or driving the same motor vehicle.

¹ To the extent *Calpito* suggests that the verdict in that case would have been reversed if it *had* been inconsistent, it is contrary to subsequent decisions by our Supreme Court and should not be followed. (E.g. *People v. Avila* (2006) 38 Cal.4th 491, 600.)

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.